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IN THE

Supreme Court of the United States

October Term, 1941

No. 573

314-661

JAMES W. MURPHY, DOING BUSINESS AS LAFRANCE TOLEDO COMPANY,
Petitioner,

vs.

JAMES A. BRADY, ACTING COLLECTOR OF INTERNAL REVENUE FOR OHIO (TENTH DISTRICT),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

WILLIAM O. BALLARD,
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Counsel for Petitioner.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

DATES OF DECREES; OPINIONS BELOW; REHEARING

Petitioner respectfully seeks a writ of *certiorari* from this court to the United States Circuit Court of Appeals for the Sixth Circuit, to review an order of that court entered May 6, 1941 (R. 45), against petitioner (appellant there), affirming a decree entered against him November 22, 1939 (R. 36), by the District Court of the

United States for the Northern District of Ohio, Western Division, at Toledo, dismissing petitioner's bill of complaint (R. 1) and dissolving preliminary injunction (R. 19-21) on motions therefor (R. 25-26) of respondent, defendant in the District Court.

No opinion was entered or filed in either of said lower courts aside from the orders, judgments and decrees entered of record as above set forth. Neither one is reported.

On the entry of the order in the United States Circuit Court of Appeals (R. 45) petitioner timely filed, namely, on June 2, 1941, his petition for a rehearing (R. 47) within the thirty days after the entry of the order in that court and otherwise as required by Rule 28 of that court.

Thereafter the Court of Appeals entertained the petition for a rehearing, and on June 5, 1941, by order duly entered on its records, denied petitioner's petition for a rehearing (R. 53).

Transcripts of the record are filed herewith as required by this court's Rule 38.

A

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

1. Summary

The matter involved here includes primarily:

(a) Interpretation and construction of Section 603 of Internal Revenue Act of 1932, 47 Stat. 169, determining whether a caustic chemical article, Tri-Sodium-Phos-

phate, a water softener, purchased by petitioner in bulk from the manufacturer thereof in St. Louis, Missouri, and then slightly perfumed by petitioner for sales appeal only, and then packaged by petitioner in cartons and distributed, sold, by him to the consumer, under petitioner's trade name, "NU-WITE," can legally be taxed under Section 603, petitioner claiming such perfumed article is not covered by that section, that is, it is not any one of the articles specifically named in the section, nor is it any substance, article or preparation similar to any one of those articles, and that therefore it can not be taxed under the section, a verbatim copy of which section reads as follows:

> "There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substances, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes."

(b) Determining whether petitioner is a manufacturer, producer or importer of the article he sells as aforesaid, petitioner claiming he can not be classed as being any one of them and that therefore for this additional reason the article he sells can not be taxed under Section 603.

(c) *Declaratory Judgment*:

Neither petitioner nor his counsel at any time contemplated or intended asking for a declaratory judgment in this action in the sense of the Federal Declaratory Judgment Statute, Act of June 14, 1934, 48 Stat. 955, Judicial Code Section 274D, 28 U. S. C. A., Section 400, which reads as follows:

> "(1) In cases of actual controversy (except with respect to federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
>
> (2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.
>
> (3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

The intention was and is only to obtain a final judgment for refund of a tax paid under protest and a final injunctive decree against collection of a tax demanded and assessed, but not paid, all as shown by paragraphs

D, E, F and G of the prayer (R. 7-8). We regret the inclusion of paragraphs B and C in the prayer (R. 7). They were superfluous and probably misled the Court of Appeals as to the intention and desire of the petitioner.

(d) Determining whether the Court of Appeals erred in affirming the District Court in its final judgment and decree dismissing petitioner's bill of complaint (R. 1-14, 29-30) without trial on the merits on complaint, answer and evidence, and thereby denying to petitioner final decree of injunctive relief prayed for, preventing respondent from collecting from petitioner by distraint on his property or otherwise a tax on perfumed Tri-Sodium-Phosphate, not paid, in the sum of $4924.27, plus a penalty, $1231.07, plus interest of $654.93, total $6810.27, demanded and assessed under Section 603 by respondent from and against petitioner prior to the filing of his bill of complaint; and thereby also denying to petitioner a judgment prayed for against respondent for a refund of the sum of $998.22, paid to respondent by petitioner under protest as a tax under Section 603 on Tri-Sodium-Phosphate, perfumed as aforesaid and sold by petitioner during the period of January 1 to June 30, 1937; petitioner claiming he is entitled to a judgment for such refund because the article he sells is not covered by Section 603 and that because of extraordinary and exceptional circumstances shown in the record as now made, and as it would be made on the complaint, answer and evidence, he is entitled to proceed by bill in equity for and to have relief as prayed for through final decree enjoining respondent from collecting the tax, penalty and interest, demanded and assessed as aforesaid, but not paid, notwithstanding Section 3224 of the Revised Stat-

utes (Title 26, U. S. C. A. 1543), a verbatim copy of which section is as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

(e) *Pleadings and Other Proceedings*:

1. Petitioner's complaint was filed in the District Court November 8, 1937 (R. 1), and at that time, aside from the prayer, he made oral application for temporary restraining order and preliminary injunction. At suggestion of the court and on consent of parties the matter was set for hearing on November 13, 1937, for preliminary injunction.

2. Such hearing was had on that day on the verified bill of complaint and exhibits thereof (R. 1-14), the affidavit of petitioner (R. 15-16) and its Exhibit E (R. 17-18) filed in Department of United States Commissioner of Internal Revenue and sent to petitioner August 9, 1937, motion of respondent filed November 12, 1937, to dismiss the complaint (R. 23-24) and argument by counsel for the parties.

3. The hearing being completed November 13, 1937, preliminary injunction was granted that day (R. 19) and preliminary injunction order was filed November 16, 1937 (R. 21-23), including approval of bond tendered and filed that day (R. 19-20).

4. November 27, 1937, respondent was given leave until December 22, 1937, to answer the complaint (R. 24), but instead thereof on December 6, 1937, he filed motion to dissolve the preliminary injunction and an amended motion to dismiss the complaint (R. 25-27).

5. March 26, 1938, petitioner by consent of parties

filed a supplement to his bill of complaint (R. 29-30) showing that on December 1, 1937, after filing of the complaint on November 8 of that year, the Commissioner of Internal Revenue denied petitioner's demand, filed with him prior to filing the compaint, for refund of the tax paid under protest, and likewise on December 1, 1937, the Commissioner rejected and denied petitioner's demand, made before filing his complaint, for abatement of the tax, penalty and interest assessed but not paid.

At this stage of the proceedings counsel for the respective parties filed their respective briefs on the questions involved with the court.

6. March 20, 1939, notice of ruling by the court was filed sustaining the motion to dissolve temporary injunction and sustaining the amended motion to dismiss the complaint (R. 31).

7. April 6, 1939, petitioner filed his motion with briefs in support thereof for a rehearing and further consideration of the cause (R. 31).

8. On or shortly prior to October 16, 1939, counsel for respondent served on counsel for petitioner copies of proposed findings of fact and conclusions of law. Counsel for petitioner understanding that such proposed findings and conclusions had been filed of record in the case for approval by the court, filed on October 16, 1939, petitioner's objections to the same (R. 34), and with such objections renewed and filed petitioner's motion for rehearing (R. 34). The proposed findings and conclusions were not filed in the clerk's office as understood by petitioner's counsel, but were filed with the judge who filed them for record on November 22, 1939 (R. 32), and on that day filed orders respectively overruling petitioner's

objections to the findings and conclusions and his motion for rehearing (R. 35).

9. Also on November 22, 1939, the court filed final judgment and decree dismissing the bill of complaint at plaintiff's costs and dissolving the preliminary injunction (R. 36).

10. Thus, on November 22, 1939, the District Court, on the complaint and its exhibits (R. 1-14), petitioner's affidavit (R. 15) and its Exhibit E (R. 17), petitioner's supplement to the complaint (R. 29-30), respondent's motion to dissolve the preliminary injunction (R. 25), and his amended motion to dismiss the complaint (R. 26-27), and briefs of counsel for the respective parties, denied petitioner's motion for a rehearing, overruled his objections to the findings of fact and conclusions of law (R. 35) and entered final judgment and decree (R. 36) dismissing the complaint at petitioner's costs and dissolving the preliminary injunction on expressed grounds that the complaint is without equity and that the court had no jurisdiction thereof because of the provisions of Section 3224, Revised Statutes (U. S. C. A., Title 26, Section 1543).

11. January 3, 1940, petitioner gave notice of appeal (R. 37) to the Circuit Court of Appeals for the Sixth Circuit, including tender of continuance of the bond theretofore given (R. 19) on preliminary injunction in the sum of $2000.00.

12. On February 1, 1940, respondent filed motion (R. 38) asking for an order that petitioner file supersedeas bond in the sum of $8703.26 ("judgment" so-called by the United States Attorney though no money judgment for taxes was entered).

13. The above motion was overruled February 13, 1940 (R. 39), and the $2000.00 bond (R. 19) was accepted by the court by its order of February 21, 1940 (R. 40).

2. Statement of Facts Involved

This suit was begun through the filing by petitioner of his complaint in the District Court November 8, 1937, and the facts involved are shown by that complaint and its Exhibits A, B, C and D (R. 1-14), his affidavit and its Exhibit E filed November 13, 1937 (R. 15-18), and his supplement to the complaint filed March 26, 1938 (R. 29-30).

Aside from preliminary allegations showing citizenship and residence of the parties, the official capacity of the defendant at the time, Graves, as Internal Revenue Collector for the Tenth District of Ohio, at Toledo, the nature of the suit, the enactment of the federal statute, said Section 603 quoted above, under which the suit arises, and giving a verbatim copy of that section (R. 1-2), the complaint in effect alleges:

(a) That petitioner then was and for about four years had been doing business in Toledo, Ohio, selling a general purpose water softener and cleaner under his registered trade name, "NU-WITE" (R. 1-3); that this water softener is Tri-Sodium-Phosphate, a white crystalline caustic chemical quickly soluble in water, which chemical petitioner purchases in bulk, large lots, from the manufacturer thereof, Mansanto Chemical Company, of St. Louis, Missouri, and which is primarily adapted, advertised and sold for all general cleaning purposes for the home, factory, hospital, bakery, creamery, farm, and other institutions, all as shown by copy of pamphlet

issued by said manufacturer, petitioner's source of supply, attached to the complaint as Exhibit B (R. 3, 10); and

(b) That petitioner sells NU-WITE in packages, cartons, copy attached to complaint as Exhibit A (R. 3, 9), and in bulk, the packaged portion being sold primarily to homes, the bulk portions to hospitals, factories and other institutions referred to above; that to a portion of the packaged product perfume is added in a minute quantity for initial sales appeal only, which in no instance changes the character of or enhances the cleaning or water softening qualities of the product (R. 3, affidavit R. 15); that NU-WITE, perfumed or unperfumed, is not one of the articles enumerated in Section 603 in question of the Revenue Act of 1932, or any similar substance, article or preparation; that it imparts no odor to the user and is so caustic that it is not only unfit for use as a cosmetic, toilet powder, or any similar article, but is actually harmful in contact with the human skin (R. 3, 4, affidavit R. 15); and

(c) That petitioner was advised by the Commissioner of Internal Revenue of the Treasury Department of the United States Government under date of August 9, 1937 (R. 3 and Exhibit E, R. 17-18) that NU-WITE not perfumed, either in bulk or in packages, is not taxable under said Section 603; that petitioner says the mere addition of perfume as aforesaid to NU-WITE as initial sales appeal only, does in no manner change its character, uses, utility or effectiveness, or convert it into any article subject to the tax imposed by said Section 603; and

(d) That defendant, Graves, claimed that the per-

fumed NU-WITE was subject to the tax imposed by said Section 603, and in February, 1937, made demand upon petitioner to file returns for each calendar month on all sales of perfumed NU-WITE made since the effective date of said Revenue Act of 1932, June 21, 1932, and said defendant then made demand upon petitioner to pay the tax for all perfumed NU-WITE theretofore packaged and sold by petitioner since said effective date, plus penalties and interest, and said defendant assessed petitioner $4924.27 tax, plus $1231.07 penalty, plus $654.93 interest, or a total of $6810.27 (R. 3, 4); and

(e) That following said defendant's demands and assessment petitioner paid to said defendant in the months of April, May, June and July, 1937, a total of $998.22 under protest as a tax on perfumed NU-WITE for the period January 1, 1937, to June 30, 1937, but petitioner never included the tax or any part thereof in the sale price of NU-WITE and never collected the tax assessed or paid under protest, or any part thereof, from petitioner's vendees (R. 4, paragraph 9, and 5, paragraph 15); and

(f) That petitioner is not subject to any tax under said Section 603 because he is neither the manufacturer, producer nor importer of the product he sells, but that he purchases Tri-Sodium-Phosphate in bulk from the manufacturer and producer thereof and that petitioner is only a merchant packaging the product and reselling it at retail (R. 4); and

(g) That Tri-Sodium-Phosphate, unperfumed and perfumed, and sold by petitioner's competitors, having the identical properties and uses and prepared for sale in identical manner as the product petitioner sells, had

not been subjected to the claimed tax sought to be imposed on petitioner, and that no attempts were being made by the Department of Internal Revenue of the Federal Government to subject said Tri-Sodium-Phosphate sold by petitioner's competitors to said tax; and that such action in attempting to impose said tax upon the product sold by petitioner is discriminatory, arbitrary and capricious (R. 4); and

(h) That the business of packaging Tri-Sodium-Phosphate is a highly competitive one and petitioner cannot pay the claimed tax on NU-WITE hereafter sold and compete with others so packaging and selling Tri-Sodium-Phosphate under other trade names upon whom no attempt has been made or is being made to impose said tax (R. 5, paragraph 14);

(i) That petitioner on advise of his legal counsel had at all times sincerely believed and still so believes that the article, perfumed NU-WITE, packaged and sold by him as aforesaid, is not subject to any tax under said Section 603 of Revenue Act of 1932 (R. 3, 4, affidavit R. 15, 16);

(j) That if perfumed NU-WITE is taxable as claimed, then under Section 626 of Revenue Act of 1932 petitioner must make monthly reports under oath in duplicate and pay the tax to said Collector, which tax becomes due and payable on making the report, and this without any assessment or notice;

That failure to make such monthly report and to pay the tax, with interest and penalty, if any, will subject all of petitioner's property to lien, distraint and sale for the tax, interest and penalty on sales heretofore and hereafter made, and on such failure defendant, unless en-

joined, will resort to remedies provided by law to enforce such payment (R. 5);

(k) That the amount of said tax heretofore claimed, assessed and demanded as aforesaid and as hereinafter stated, is so large that petitioner could not and cannot pay the same; that to raise the money therefor would require petitioner to liquidate and sacrifice his assets in whole or in the greater part needed to transact his business; that enforcement by defendant through the methods provided by law of payment of the claimed and assessed tax not paid on sales heretofore made and hereafter to be made, will seriously cripple, if not completely destroy, petitioner's business and its valuable good-will, ruin petitioner financially and inflict on him a permanent and irreparable injury and loss, for which he has no remedy at law; and additionally, that loss of petitioner's business will throw many persons out of employment who are self-supporting through employment by petitioner (R. 5, paragraph 14);

(l) That on October 5, 1937, prior to filing of the complaint on November 8, 1937, petitioner filed with defendant claim for refund of said tax paid under protest in the sum of $998.22 (R. 6), copy of said claim being Exhibit C (R. 11);

(m) That on October 21, 1937, petitioner received notice and demand from the United States Treasury Department, Internal Revenue Service, on its Form 17, for payment of said tax of $4924.27, penalty of $1231.07, and interest of $654.93, assessed as aforesaid, a total of $6810.27, but not paid prior to January 1, 1937 (R. 6, paragraph 17);

(n) That on October 23, 1937, petitioner filed with

defendant a claim for abatement of the assessment last above mentioned (R. 6, copy of the claim being Exhibit D, R. 13);

(o) That petitioner's supplement (R. 29) to his complaint filed March 26, 1938, alleges,

(1) That on December 1, 1937, after the complaint was filed November 8, 1937, the United States Commissioner of Internal Revenue in writing communicated to petitioner an order holding that perfumed NU-WITE water softener or NU-WITE water softener sold in perfumed containers are preparations sales of which are subject to tax under the provisions of said Section 603, and that petitioner's claim for refund of the tax of $998.22 paid under protest covering the period of January 1, 1937, to June 30, 1937, including interest, was rejected in full; and that no part of the sum so paid has been refunded; and

(2) That on December 1, 1937, after the complaint was filed November 8, 1937, the Commissioner in writing communicated to petitioner an order holding that perfumed NU-WITE water softener or NU-WITE water softener sold in perfumed containers are preparations sales of which are subject to tax under the provisions of said Section 603, and that petitioner's claim for abatement of said tax assessed but not paid in the sum of $6810.27, including penalty and interest, was rejected in full; and that no part of said amount has been abated;

(p) The complaint as filed November 8, 1937, in its last paragraph 19 (R. 7) alleges in effect, that immediate and irreparable injury, loss and damage would result to petitioner before notice could be served and a hearing had thereon, unless a temporary restraining order

against defendant should be issued; that unless such order should be issued petitioner and his employees, on failure of immediate payment of the claimed tax, would be subject to heavy criminal and the other penalties provided by law; and that collection of the tax by summary process pending a hearing for temporary injunction would leave petitioner without adequate remedy at law or in equity.

B

STATEMENT DISCLOSING JURISDICTION

1. The final judgment and decree of the United States Circuit Court of Appeals for review of which *certiorari* is sought, was entered against petitioner May 6, 1941 (R. 45); petition for rehearing was filed June 2, 1941 (R. 47), within the thirty days prescribed by Rule 28 of that court, and was denied by that court's order entered June 5, 1941, at which latter date the decree became final and from which the three months' limitation for making application for *certiorari* began to run, and it expires September 5, 1941.

Section 8(a), Act of February 13, 1925, 43 Stat. 936.

This proceeding is timely filed under that Act and this court's Rule 38.

Bank vs. Opperman, 249 U. S. 448, 449; 63 L. Ed. 701.

Gypsy Oil Company vs. Escoe, 275 U. S. 498; 72 L. Ed. 393.

United States vs. Seminole Nation, 299 U. S. 417, 421; 81 L. Ed. 316.

2. This suit arises under Federal Statute Section 603, Revenue Act of 1932, requiring interpretation and construction of that statute to determine petitioner's rights and liabilities thereunder and therefore a federal question is presented.

McCain vs. Des Moines, 174 U. S. 168, 181; 43 L. Ed. 936.

Downs vs. Bidwell, 182 U. S. 244, 248; 45 L. Ed. 1088.

Gully vs. Bank, 299 U. S. 109, 112-114; 81 L. Ed. 70.

3. The District Court had jurisdiction under the Judicial Code, Section 24, amended, Subdivision (5), Fifth, Title 28, U. S. C. A. 41, (5), Fifth, the provision being that "The District Courts shall have original jurisdiction as follows: * * * (5), Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeal (Court of Customs and Patent Appeals)." 45 Stat. 1475. This statute confers jurisdiction upon the District Court in such cases regardless of the amount involved.

Downs vs. Bidwell, 182 U. S. 244, 248; 45 L. Ed. 1088.

4. The Circuit Court of Appeals had jurisdiction to review on appeal the final judgment and decree (R. 36) of the District Court under Section 128 of the Judicial Code as amended by the Act of February 13, 1925, 43

Stat. 936, the applicable provisions thereof being as follows:

> "Sec. 128(a). The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions—
>
> First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 238."

5. (a) This court has jurisdiction to review on *certiorari* the final decree (R. 45-46) of the Circuit Court of Appeals under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, the provisions of which are as follows:

> "Sec. 240(a). In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by *certiorari*, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

(b) The United States statute, the interpretation and construction of which is involved, is Section 603 of the United States Internal Revenue Act of 1932, 47 Stat. 169, quoted in verbatim in the summary 1 (a) of this petition.

(c) The decree order (R. 45-46) of the Circuit Court of Appeals to be reviewed became final June 5, 1941, when petitioner's petition for rehearing (R. 47),

filed June 2, 1941, was denied and entered June 5, 1941 (R. 53).

Hull vs. Burr, 234 U. S. 712, 721, 722; 58 L. Ed. 1557.

C

QUESTIONS PRESENTED

(a) The questions presented arise on petitioner's complaint and its exhibits (R. 1-14) with supplement thereto (R. 29), petitioner's affidavit and its Exhibit E (R. 15-18) submitted on the hearing for preliminary injunction and made part of the record and being really another supplement to the complaint, defendant's motion to dissolve the preliminary injunction and his amended motion to dismiss the complaint, both filed December 6, 1937 (R. 26-27), on alleged grounds that Section 3224, Revised Statutes (Section 1543, Title 26, U. S. C. A.), prohibits a suit to restrain assessment or collection of a federal tax; that the complaint sets out no facts entitling plaintiff to the relief prayed for in a court of equity or to injunctive relief pending the cause; that petitioner has adequate and complete remedy at law; and that the complaint does not set forth facts sufficient to constitute a cause of action in equity.

The District Court dissolved the injunction and dismissed the complaint (R. 36) and the Circuit Court of Appeals affirmed the District Court (R. 45) and denied petition for rehearing (R. 47-53).

(b) The questions presented are as follows:

1. Whether there were present exceptional and extraordinary circumstances shown by the record to

attend the case entitling the plaintiff notwithstanding said Section 3224, Revised Statutes, to institute and prosecute to conclusion this suit for order of refund to him of the amount of the tax paid under protest in the sum of $998.22, and for an injunctive decree forbidding collection of the tax, penalty and interest assessed against him but not paid in the sum of $6810.27.

2. The Internal Revenue Commissioner holding that NU-WITE, Tri-Sodium-Phosphate, not perfumed, whether sold in bulk or in packages, is not taxable under Section 603 (R. 3, paragraph 7, R. 15-18, affidavit and its Exhibit E, questions 2, 4, 5), does the addition by petitioner of a minute quantity of perfume oil to the packaged article for sales appeal only and imparting no odor to the user or anything washed with the softened water, and which does not in any instance change the character of the Tri-Sodium-Phosphate or enhance the cleansing or water softening qualities thereof, convert the packaged Tri-Sodium-Phosphate so perfumed into one of the articles specifically named in Section 603, or into any article, substance or preparation similar to any of such specificially named articles, and thus make such packaged article taxable under the section?

3. Whether by adding perfume oil in the manner, to the extent and only for the single purpose of sales appeal, namely, an odor attraction only, petitioner became a manufacturer, producer or importer.

4. Whether, under the peculiar circumstances of this case, although on motion to dismiss the complaint its allegations must be taken as true, the motion should not have been overruled and answer required so a trial on the merits could have been had on such pleadings, and on evidence.

D

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner seeks a writ of *certiorari* from this court because it is believed there are special and important reasons therefor:

1. The decision below involved a principle of far reaching importance to the public concerning the collection of internal revenue excise taxes, and if that decision shall be allowed to stand then any article not named in such a statute as the one involved here may be made taxable by the Commissioner's own edict, without authority of law simply because the article in question in the case has been given, for sales appeal only, some form of attraction pleasing to the sense of sight or of smell, although the attraction does not in any sense change the form, the properties, quality, utility or function of the article sought to be taxed.

2. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

3. The Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court and in conflict with decisions of other Circuit Courts of Appeals.

4. The Circuit Court of Appeals has decided an important question of general law in a way untenable and in conflict with the weight of authority.

5. The Circuit Court of Appeals in its order and decision (R. 45-46) erred in affirming the decree (R. 36) of the District Court, thereby deciding all the questions presented as shown above in C against petitioner.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8571, *James W. Murphy, Doing Business as LaFrance Toledo Company, Appellant, vs. James A. Brady, Acting Collector of Internal Revenue for the Tenth Ohio Collection District, Appellee*, and that said decree of said Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

WM. O. BALLARD,

U. G. DENMAN,

Counsel for Petitioner.